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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 505

IN THE MATTER OF APPORTIONMENT OF THE MICHIGAN LEGISLATURE

MAXWELL F. BADGLEY, et al.,
Appellants,
v.
SECRETARY OF STATE JAMES M. HARE, and AUGUST SCHOLLE, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

PETITION FOR REHEARING

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By the *per curiam* decision of the Court of November 21, 1966, appellees' Motions to Dismiss the above entitled appeal were granted without opinion, the appeal having been dismissed "for want of a substantial federal question." Appellants respectfully request the Court to rehear appellees' Motions to Dismiss or Affirm, and to reconsider its decision granting the Motions.

Basis of This Application

Appellants seek a rehearing only with respect to the Court's determination that a substantial federal question was not presented by the arbitrary action of the Michigan Supreme Court in denying to appellants an opportunity to present evidence.

In the Jurisdictional Statement (pp. 34-5), appellants relied upon *Burns v. Richardson*, 384 U.S. 73 (1966) and *Fortson v. Dorsey*, 379 U.S. 433 (1965), in support of their position that gerrymandering constituted a justiciable *federal* cause of action under the Equal Protection Clause. Appellants argued that the refusal to allow the presentation of any evidence material to this claim denied to appellants a constitutionally fair hearing.

Appellants did not raise, however, the separate and distinct ground that this same refusal to hear evidence denied appellants the constitutional right to prove their justiciable *state law* claim that the Michigan apportionment plan was deliberately gerrymandered for partisan political purposes in violation of Article 4 of the Michigan Constitution of 1963.

I.

It is, of course, well settled law that the refusal of a state court to receive or consider competent proof material to an issue in the litigation, whether involving state or federal law, amounts to a denial of a hearing on that issue, in contravention of the due process clause of the Constitution of the United States. *Georgia R. & Electric Co. v. Decatur*, 295 U.S. 165, 171 (1935); *Londoner v. Denver*, 210 U.S. 373, 385-6 (1908). See also *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U.S. 88,

91 (1913). The right to be heard on lawful claims, including the introduction of evidence in support of such claims, is a constitutional right and the denial of that right is a denial of due process. *Republic National Bank of Dallas v. Crippen,* 224 F. 2d 565, 566 (5th Cir. 1955). These cases clearly support appellants' constitutional right to a full hearing, including the introduction of evidence, in enforcing a fundamental state right—the right to a vote unimpaired by gerrymandered legislative districting.[1] See also, *Baltimore & Ohio R. Co. v. U.S.,* 298 U.S. 349, 369 (1936).

II.

In *Burns v. Richardson, supra,* Mr. Justice Brennan, for the Court, had much to say about the implications of *proof* in support of a claim of "invidious discrimination" that would operate to "minimize or cancel out the voting strength of racial or political elements of the voting population." (384 U.S. at 88, 89.)

In concluding that the interim legislative apportionment plan had not been shown to "fall short of constitutional standards," the Court expressly reserved the right of "constitutional challenge" by plaintiffs in that case, based upon a showing of invidious discrimination. (*Id.* at 89, 97.) Said Mr. Justice Brennan, "There may, for example, be merit in the argument that by encouraging block voting multi-member districts diminish the opportunity of a minority party to win seats. But such effects must be demonstrated by evidence." (*Id.* at 88, footnote 14.) The Court, in granting interim approval of the apportionment plan there involved, expressly reserved for future consideration, based upon evidence, "infirmities, temporary

[1] Appellants' standing, under Section 6 of Article 4 of the Michigan Constitution of 1963, to enforce their rights on the state-based cause of action in an adjudicative proceeding in the Michigan Supreme Court, is undisputed.

or permanent, not established by the present record." (*Id.* at 97.)[2]

If in *Burns* the interests of justice required that plaintiffs there be accorded the right at a later date to introduce proof of discrimination not previously offered in the district court, then *a fortiori*, serious consideration should be given, we respectfully submit, to the elaborate offer of proof that was properly and timely made in the case at bar.

III.

Testimony of witnesses and documentary evidence were offered to establish that past election results had been used to draw legislative districts deliberately gerrymandered for partisan political purposes, and that the district boundary lines operated to minimize and cancel out the voting strength of political elements of the voting population.

The offer of proof was clear, precise and specific: It involved proof by "testimony of witnesses, including the members of the Commission on Legislative Apportionment, certain individuals who assisted Democratic commissioners Austin and Kleiner in drawing the Plan, historians, political scientists, mathematicians, representatives of the major political parties in Michigan, incumbents in the state legislature in 1963-1964, and county, township, and city government officials, as well as documentary evidence consisting of memoranda, charts, statistical exhibits and maps, to prove the following facts." The facts are then set forth on pages 10-13 of appellants' Jurisdictional Statement; copies of the relevant portions are attached hereto as an exhibit.

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[2] See also, *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

Manifestly, the testimony and documentary evidence offered was competent, and clearly it was material to the issue of whether the apportionment law was gerrymandered in violation of the Michigan Constitution. Only after the evidence had been presented could a court properly decide whether appellants have met the requisite burden of proof.[3]

IV.

This Court's decision not to entertain appellants' Fourteenth Amendment attack on political gerrymandering, should not be dispositive of the present petition. The due process right to a hearing is grounded upon both the federal and state causes of action. Whatever inhibitions be thought to impede the appeal on the federal cause of action, there should be no obstacle to proceeding to a hearing on the state cause of action, because the state constitution itself articulates precise standards and contemplates their enforcement by judicial action. It is clear that an apportionment plan that contains legislative districting deliberately gerrymandered for partisan political purposes, creates a justiciable Michigan claim because it violates Article 4 of the Michigan Constitution of 1963. This is the view of a majority of the justices of the Michigan Supreme Court.[4]

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[3] The Michigan Supreme Court need not have actually taken the evidence; under Michigan procedure, it could have been heard by a circuit court judge or by a master appointed for that purpose by the Michigan Supreme Court.

[4] Only three of the eight justices (Kavanagh, Smith and Souris) held that the various anti-gerrymandering standards of Article 4, not being severable from other invalid provisions, do not support a claim of gerrymandering as a matter of state law. In contrast, in an opinion in which Justice Black concurred, Justice Adams stated that the Article 4 provisions of the Michigan Constitution were adopted to forbid political

(Continued on next page)

Nevertheless, throughout the proceedings the Michigan court adamantly refused to allow appellants to introduce evidence in support of that state cause of action. In its January 14, 1965 and February 5, 1965 orders, both unreported, that court denied discovery and directed the presentation of oral argument without allowing the presentation of evidence. Subsequent to oral argument, the court remanded the Austin-Kleiner plan to the apportionment commission in November 1965. (376 Mich. 410, 481-3, 137 N.W. 2d 495, 526.) By order dated January 12, 1966, the Court ordered the delivery to the Supreme Court Clerk's office, for filing, all of the official proceedings and records of the apportionment commission. Obviously, these records contained little, if any, of the evidence that appellants sought to present. Finally, in April 1966, and again without allowing the presentation of evidence by appellants, the court upheld the validity of the Austin-Kleiner plan as a matter of state and federal law. (377 Mich. 396, 140 N.W. 2d 436.)[5]

Conclusion

Even if appellants' claim of political gerrymandering is determined not to be a substantial federal question—in spite of the almost invitatory language of this Court's

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(Continued from preceding page)

gerrymandering. (See 376 Mich. 410, 457 and 483-4, 137 N.W. 2d 495, 514, and 138 N.W. 2d 16.) Similarly, Justice Kelly, in his November 1965 opinion, in which Justice Dethmers concurred, held that the formation of legislative districts by the use of previous election results, giving one political party advantage over the other, violated the Michigan Constitution. (See 376 Mich. 410, 426-8, 436-8, and 440, 137 N.W. 2d 495, 498-9, 505; see also 377 Mich. 396, 431-2 and 424-5, 140 N.W. 2d 436, 448, and 444-5.) And Justice O'Hara expressly concurred with Justice Dethmers' March 1966 opinion condemning the gerrymandering in the Austin-Kleiner plan. (377 Mich. 396, 433, 140 N.W. 2d 436, 448-9.)

[5] Justices Dethmers and Kelly commented upon this obdurate denial of the appellants' request to present proof of gerrymandering. (See 377 Mich. 396, 424-5, 427, 429 and 431, 140 N.W. 2d 436, 444-7.)

opinion in *Burns*—it does constitute a justiciable cause of action under the clear standards of the Michigan Constitution. And the persistent refusal by the Michigan Court to take, or direct the taking, of the evidence offered by appellants to support the claim was a denial of due process under the Fourteenth Amendment.

The reluctance of this Court to go behind the decision of a state court of last resort is quite understandable if the parties have had an opportunity to present the kind of evidence referred to by Mr. Justice Brennan in *Burns*. But if that opportunity has not been offered and if the Court is to turn its back upon such a flagrant denial of due process as is involved here in the refusal of the Michigan Court to hear any proof at all, then the "one-man, one-vote" principle could become an instrument of political oppression, rather than a Magna Charta of fair and equal representation in the voting booths of the nation, as the Court intended it to be.

Wherefore, appellants pray that the Court grant a rehearing on appellees' Motions to Dismiss or Affirm in the above cause.

Respectfully submitted,

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Dated: December 15, 1966.

I hereby certify that the foregoing petition is presented in good faith and not for delay, and that such is restricted to the ground set forth above, which was available to appellants but not previously presented.

.....

William T. Gossett

Exhibit 1

"Austin-and Kleiner and others who actually participated in the drawing of the Austin-Kleiner Alternate Plan obtained and utilized extensive data and records of past voting results in each precinct, city, township and county, specifically including the results of the 1962 State Treasurer election, which data and records were compiled and tabulated by and with the support of the Democratic Party and the International Union, UAW. The purpose of utilizing such data and records by Austin, Kleiner and their aides, was the creation of an apportionment plan most favorable to the Democratic Party and its candidates.

Different variations of a plan with districts of equal population were drawn from time to time in the course of preparing the Austin-Kleiner Alternate Plan, each of which was tested by application of such data and past voting records, and such plan was successively revised and redrawn in attempts to maximize Democratic Party voting strength or to minimize Republican Party voting strength.

The draftsmen of the plan, after its adoption, openly boasted of their success in achieving their objectives and also stated openly that they intended the plan as "a negotiating document" and had not expected to be able to get it adopted in its original form.

The plan accomplishes such gerrymandering by apportioning the districts without any regard for political subdivision or natural or historical boundary lines, and by constructing unnaturally shaped districts in order to join geographically separated concentrations of voters of one or the other party or to split up certain of such concentrations.

The intentional acts of malapportionment and gerrymandering for political advantage incorporated by the draftsmen of the plan include the following:

(a) By deliberately joining areas which the 1962 election results showed to have voted for a particular party's candidates, the draftsmen drew five House

districts in Genesee County which cancelled out Republican voting strength there altogether. Based on the 1962 results, all five districts would have gone to Democratic Party candidates although Republicans polled approximately 45% of the overall vote. The actual results of the 1964 contests in these districts were that all five seats went to Democrats, although Republicans polled 39% of the vote.

(b) By contrast, the same technique of joining areas of known voting behavior was employed to maximize Democratic Party voting strength in the five House districts in Kent County. There, the 1962 election results showed that two of the five seats would have gone to Democratic candidates while the Democratic Party polled approximately 40% of the overall vote. In 1964 the Democrats won their two seats handily.

(c) Similarly, the ten House districts encompassing Oakland County (plus three townships of Genesee County) were drawn in such a way that the Republicans could count on five "safe" seats while polling, according to the 1962 election results, 60% of the vote. (The actual results of the 1964 contests in these districts were that the Republican candidates took four seats while polling 50% of the vote.) This was accomplished by dividing up cities so that areas of high Republican voting strength were impacted and extra Democratic pluralities could be added to areas of marginal Republican voting strength.

(d) By crossing county lines to join together physically-separated cities which the 1962 election results showed to demonstrate Democratic Party voting patterns, "safe" Democratic seats were created in the Senate districts 33 and 34. District 33 was formed by separating the City of Manistee, the county seat of Manistee County, from the rest of its county and joining it with a group of counties extending south to include the City of Muskegon, 75 miles away. Similarly, the cities of Saginaw and Bay City, respectively the

county seats for their counties, were joined together into District 34, with a few intervening townships from both counties, while the rest of the surrounding townships from both counties were formed into a horseshoe-shaped District 35. Based upon 1962 election results, Districts 33 and 34 would be Democratic seats, while the adjoining Districts 35 and 36 would be Republican districts, although any other configuration which did not involve the joining of the cities would not have resulted in a Democratic district in either area. These four seats came out exactly as predicted in 1964, two Republican and two Democratic.

(e) In the case of Senate District 17, the City of Pontiac, the county seat for Oakland County, together with seven townships in the northwestern part of the county, was joined with all of Lapeer County in order to cancel out Republican voting strength in Lapeer County.

(f) Other House districts were drawn in such a way as to split up parts of cities which were disclosed by the 1962 election results to be strong areas of Republican party voting, by dividing them into separate pieces and combining them with other cities for the purpose of diffusing and ultimately destroying the voting power of those concentrations, as in the case of House Districts 31, 32 and 33, which cut into three parts the northwest quarter of the City of Dearborn, an area shown by the 1962 election results to have returned a high Republican vote.

(g) In certain districts, such as House Districts 43 and 51, townships where incumbent Republican legislators resided were unnaturally and unnecessarily detached from the rest of their counties and combined with territory containing another Republican incumbent in order thus to defeat one of them or force him to move away from his constituency."